

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: April 19, 2001
Case No: 2000-INA-311

In the Matter of:

MORTGAGE DATA BANK
Employer

On Behalf of:

JUANITO TING
Alien

Appearance: Dan E. Korenberg, Esq.

Certifying Officer: Pandora L. Wong
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Juanito Ting ("Alien") filed by Employer Mortgage Data Bank ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On September 12, 1996, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Market Research Analyst in its Credit Report business.

The duties of the job offered were described as follows:

Perform market research studies of local, national & foreign markets to determine potential clients of credit and business reporting services, tenant screening, and pre-qualifying reports..Research, examine, and analyze statistical Data concerning demand and supply to forecast future marketing trends. Establish comparative market study by gathering data on competitors and analyzing prices, sales, types of service, methods of marketing and product distribution. Conduct marketing surveys and feasibility studies to determine profitability of new state/national outlets and branch locations. Perform market review and research studies to determine new sources of services that are suitable for current markets especially Chinese and Filipino community.

Compile, analyze and present data in form of reports and graphic illustrations for management use. Based on marketing studies, evaluate and recommend to management cost/capital investment needed for expansion and diversification programs in terms of profit and loss forecasts.

Wages were \$2466.00 per month; a bachelor's degree in marketing or business administration and two years experience in the job offered was required or in the related occupation of Marketing Manager. Other special requirements was: Must be able to speak, read,& write Chinese (Fookien). Must be able to use WordPerfect 5.1 and DataBase software. Will be tested in ability to perform special language and software requirements. The applicant would supervise two employees and report to the President. (AF-38-103)

On March 10, 2000 the CO issued an NOF proposing to deny certification on several bases. The CO found that Employer had made overly restrictive requirements that indicate the job offered was tailored to meet alien's experience and therefore, questioned whether the job offer was bona fide and open to all U.S. qualified applicants. Secondly, the business was indicated to be very small with only two part-time employees. Corrective action for both findings were complete documentation that the job exists and that full-time work can be accomplished; specific documentation required was a copy of Employer's business license and federal income tax returns. The CO further found the foreign language requirement was restrictive. Corrective action was either deleting the requirement and readvertising or demonstrating that the language requirement is essential to the business and not merely a preference. The CO, also, found Employer had rejected U.S. applicant Tham in violation of CFR 656.21(b)(6). Employer's efforts to contact Tham took place on October 16, 1995, over three weeks after resumes were forwarded on September 26, 1995. Corrective action was a rebuttal giving details of attempts to interview the U.S. applicants. (AF-32-36)

Employer, in its rebuttal dated April 13, 2000, stated that it made a major change in its business at the time of labor certification, i.e., the old partnership had dissolved and Mr. Co took over the company with a need to investigate new markets and marketing strategies for its credit reporting business. Thus the position of Market Research Analyst was created. Employer further maintained that the company still has an opening in the company. The current business license was attached. Since Mr. Co's accountant was out of the country federal income tax and business tax returns were not available, but would be submitted as soon as available. With respect to the business necessity of the foreign language, Employer stated that its business was targeted for the Chinese community in Monterey Park, California; a copy of the company's advertisement in Chinese was enclosed. Employer alleged that the Chinese language (Fookien) was spoken about forty percent of the time with clients. Employer alleged it had forwarded letters to applicant Tham on October 3, 1995 and again on October 12, 1995. Thus initial attempts to contact her were timely. She later withdrew her application. Therefore, a good faith effort of recruitment was made. (AF-19-31)

On April 24, 1998, the CO issued a Final Determination, denying labor certification. The CO stated: "The evidence is clear this position was created for the alien, is tailored to his background, and is not clearly open to any qualified U.S. worker as regulations require." The CO noted that tax forms were not furnished as required in the NOF nor other evidence presented that would demonstrate the job offer was for a full-time

employee. Finally, the CO found Employer had not provided convincing documentation that a good faith effort had been made to recruit applicant Tham. (AF-17-18)

On June 30, 2000 Employer mailed a "Motion to Reconsider and Request for Review" Attached to the petition was income tax returns for 1998 of Mr. Co including Schedule C "profit or Loss from Business" as well as an affidavit from Mr. Co, which, basically, reiterated his previous contentions.(AF-1-16)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 1992-INA-321 (Aug. 4, 1993). Where the CO reasonably requests specific information to aid in the determination of whether certification should be granted, the employer must provide it. Landscape Service Corporation, 1996-INA-085 (Jan. 26, 1998). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not at issue before the Board. Barbara Harris, 1988-INA-32 (1989)

We agree with the CO that Employer has not carried his burden of demonstrating that a bona fide full-time job offer existed. During the application process, Employer was apprized on numerous occasions that the narrowly focused, small business must demonstrate the need for a full-time market research specialist since alternatives, such as hiring a large specialist firm on a consulting part-time basis were available. On the other side of the coin, alien's last three jobs, including at time of application, were in the areas of sales, marketing and as a claims adjustor; none were demonstrated to involve market research as set out in the job duties. Given these conditions, documentation by Employer that a bona fide full-time job existed and that, if so, the job offer was not tailored to meet alien's qualifications and, therefore, be unduly restrictive becomes even more necessary. Employer has failed to provide this documentation. We note, specifically, that Employer failed to timely submit business and income tax records as required in the NOF. Since we decide the matter on these grounds it is unnecessary to discuss the other reasons for denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is
AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge